

Supreme Court, U.S.

FILED

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No.

05-425 SEP 19 2005

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

JOHN GOUDIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
LAW OFFICES OF
PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, Florida 33156
(305) 670-1441
Counsel for Petitioner

QUESTIONS PRESENTED

I.

WHETHER CERTIORARI REVIEW IS WARRANTED TO: (A) RESOLVE THE CIRCUIT CONFLICT CONCERNING THE STANDARDS FOR DETERMINING A SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN THE PLEA PROCESS; (B) DETERMINE WHAT INFORMATION COUNSEL MUST CONVEY TO A DEFENDANT IN ORDER TO SATISFY THE PERFORMANCE PRONG OF THE *STRICKLAND* STANDARD IN THE PLEA PROCESS, INCLUDING WHETHER COUNSEL HAS A DUTY TO KNOW AND DISCUSS THE CLIENT'S SENTENCING EXPOSURE UNDER THE APPLICABLE SENTENCING STATUTES OR GUIDELINES.

II.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT OVER WHETHER A PETITIONER SATISFIES THE PREJUDICE COMPONENT OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PLEA PROCESS WHERE HIS TESTIMONY THAT HE WOULD HAVE ACCEPTED THE PLEA OFFER BUT FOR COUNSEL'S INEFFECTIVENESS IS SUPPORTED BY "OBJECTIVE EVIDENCE" SUCH AS A SUBSTANTIAL DISPARITY BETWEEN THE SENTENCE IMPOSED AFTER CONVICTION AND THE SENTENCE PROPOSED IN THE PLEA OFFER AND/OR BY CORROBORATING TESTIMONY OF TRIAL COUNSEL.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Goudie v. United States*, No. 04-13328 (11th Cir. February 28, 2005), which affirmed the judgment denying postconviction relief entered by the United States District Court for the Southern District of Florida, is contained in the Appendix. (App. A).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on February 28, 2005. (App. A). On May 27, 2005, the court of appeals entered an order denying the petitioner's timely filed petition for rehearing and rehearing en banc. (App. B). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to September 26, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A.

The petitioner and others were indicted for felony violations of various federal fraud statutes. Following a jury trial, the petitioner was convicted as charged and the convictions were affirmed on appeal. *United States v. De Leon, et al.*, 46 Fed.Appx. 617 (11th Cir.2002), *rehearing en banc denied*, 54 Fed.Appx. 935 (11th Cir.2002).

Pursuant to 28 U.S.C. § 2255, the petitioner filed a motion to vacate alleging the ineffective assistance of his trial counsel in violation of the standards for effective assistance of counsel, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as applied to the plea process in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The motion alleged, in pertinent part, that the government advised the petitioner's counsel, Edward O'Donnell, of a pretrial plea offer whereby the petitioner would serve no term of incarceration and not be required to testify. The resulting conviction would be for a misdemeanor. The petitioner alleged that O'Donnell failed to discuss the consequences or advisability of accepting the plea offer versus

the consequences of a jury verdict of guilt and never informed the petitioner of his sentencing exposure under the applicable Federal Sentencing Guidelines or sentencing statutes. Following an evidentiary hearing, the Magistrate Judge found that the petitioner's counsel was ineffective and recommended that the district judge grant the petitioner's motion. The district judge conducted a *de novo* hearing and denied relief. The petitioner appealed and the judgment of the district court was affirmed. The petitioner seeks certiorari review.

-B-

The facts of the case recounted in this section are taken from the district judge's "Order Declining to Adopt Report of Magistrate Judge and Denying Petitioner's Motion to Vacate Pursuant to 28 U.S.C. § 2255" which is reported as *Goudie v. United States*, 323 F.Supp.2d 1320 (S.D.Fla.2004).

The petitioner was indicted on four counts of conspiracy and money laundering in violation of 18 U.S.C. §§ 371, 1956(h), 1956(a)(1)(A), and 1956(a)(1)(B). After a ten-week jury trial, the petitioner was convicted on all four counts. The petitioner appealed and the United States Court of Appeals for the Eleventh Circuit affirmed. The petitioner filed a motion to vacate pursuant to 28 U.S.C. § 2255, claiming ineffective assistance of counsel. Following an evidentiary hearing, the Magistrate Judge issued his Report and Recommendation that the motion be granted. The government filed objections and the district judge held a *de novo* evidentiary hearing. *Goudie*, 323 F.Supp.2d at 1321.

The petitioner's trial counsel, Edward O'Donnell, testified that the government was prepared to allow the petitioner to plead guilty to a misdemeanor and that the petitioner would not be required to serve any time nor would he be required to testify at the trial of any co-defendant. O'Donnell testified that he told the petitioner about the plea offer. O'Donnell described the offer to the petitioner as "no time, no testimony." O'Donnell recounted that the petitioner asked: "Ed, why should I plead guilty to anything, I didn't do anything." O'Donnell responded by stating that he admired the petitioner's resolve. O'Donnell testified that after this conversation with the petitioner, he advised the government that the petitioner had decided to go to trial. O'Donnell testified that he and the petitioner did not discuss the

possibility of a plea offer again. The petitioner contended that O'Donnell never discussed the possibility of pleading guilty with him and never told him that the government had offered to allow him to plead guilty to a misdemeanor prior to trial. The petitioner testified that he only learned of the misdemeanor plea offer after the trial when the prosecutor asked him why didn't he accept their offer. The petitioner testified that his response was "what offer?" The prosecutor testified and confirmed this exchange with the petitioner. *Id.* at 1321-22.

The petitioner testified that when he was found guilty after trial, he asked O'Donnell what kind of sentence he was facing "because [he] had never really talked to anybody [about] what [he] was facing" and that O'Donnell answered that he would call him during the next two weeks and explain the sentencing guidelines to him. The petitioner claimed that O'Donnell never called him. The petitioner stated that his wife asked a friend's husband, an appellate attorney, to come to their house and explain the Federal Sentencing Guidelines and the possible sentence under the Guidelines. The attorney came and advised that he was facing incarceration for a term of ten years. The petitioner also stated that prior to his conversation with this attorney, he had not been informed of "the ramifications of the case." However, the petitioner admitted on cross examination that prior to trial, he knew that if he were convicted it would be a "very serious matter" and that he would be going to prison for a long time. The petitioner contended that if the misdemeanor plea offer had been communicated to him by his attorney at the time that it was made, approximately two weeks before the trial started, he would have accepted that offer. He reasoned that his "whole thing was not going to jail," and that he definitely would have accepted an offer that meant he wouldn't have had to go to jail or sit through a trial. *Id.* at 1322-23.

O'Donnell testified that in the course of his representation of the petitioner, he had informed the petitioner that a guilty verdict would result in the petitioner being a convicted felon and that the petitioner could be sentenced to prison time. However, O'Donnell acknowledged that he never discussed with the petitioner, before or after the plea offer, the specific amount of prison time the petitioner was facing under the Sentencing Guidelines. *Id.* at 1323.

In his Report, the Magistrate Judge found that

"O'Donnell's performance was unreasonable under prevailing professional norms because of his failure to adequately advise petitioner about the specific terms of the plea offer and the potential consequences of going to trial." *Id.* at 1324. The Magistrate Judge did not resolve the issue of whether O'Donnell communicated the plea offer to the petitioner. Instead, he found that even assuming O'Donnell's recollection of events were accurate, his brief explanation of the "no time, no testimony" plea offer was insufficient to allow the petitioner to make an informed decision. The Magistrate Judge found that O'Donnell's failure to discuss the advantages and disadvantages of the offer with the petitioner, to review the Sentencing Guidelines with the petitioner, or to explain to the petitioner the advisability of accepting or rejecting the offer, amounted to constitutionally ineffective assistance of counsel. *Id.* at 1324.

The Magistrate Judge further found that the petitioner had successfully demonstrated that O'Donnell's "unreasonable acts or omissions prejudiced him." Specifically, the Magistrate Judge determined that a reasonable probability existed that but for O'Donnell's errors, the petitioner would have accepted the plea offer and pled guilty to a misdemeanor. In reaching this conclusion, the Magistrate Judge relied on the petitioner's testimony, which he found to be "highly credible." In addition, the Magistrate Judge found that O'Donnell's testimony that the offer was "generous" and that he thought that the petitioner was going to be "delighted" with the offer corroborated the petitioner's testimony. Based upon these findings, the Magistrate Judge recommended that the district judge grant the petitioner's Motion to Vacate. *Id.* at 1324-25.

C.

Based upon the foregoing facts, the district judge made the following rulings.

In contrast to the finding of the Magistrate Judge, the district judge found that the petitioner's testimony that O'Donnell never informed him about the misdemeanor plea offer was not credible and further found that O'Donnell's testimony that he communicated the misdemeanor plea offer to his client was credible. *Id.* at 1328-29. (That determination by the district judge was not challenged by the petitioner on appeal and finally resolved the issue whether O'Donnell failed

to convey the plea offer.)

The district judge then turned to the question whether O'Donnell's performance in communicating the plea offer to the petitioner violated the petitioner's Sixth Amendment right to effective assistance of counsel. *Id.* at 1330. After reviewing various decisional authorities, the district judge concluded that in the plea process,

[t]he case law does not clearly define how much and what kind of information must be conveyed to a defendant in order to satisfy the performance prong of the *Strickland* standard." *Id.*

The district judge found that although it was "clear" that O'Donnell and the petitioner had a conversation about the misdemeanor plea offer prior to trial, "it is equally clear that the conversation was brief and that O'Donnell neither explained how the Federal Sentencing Guidelines would apply to Petitioner or how he should respond to the plea offer." *Id.* at 1331. The district judge noted O'Donnell's testimony "that he never discussed with Petitioner, before or after the plea offer, the specific amount of prison time Petitioner was facing under the Sentencing Guidelines." *Id.*

Nevertheless, the district judge ruled that O'Donnell's failures did not constitute ineffective assistance of counsel in violation of the Sixth Amendment. The district judge rejected the Magistrate Judge's ruling that O'Donnell was ineffective for his failure to explain to the petitioner the minimum and maximum sentences he was facing under the Sentencing Guidelines and applicable statutes. Distinguishing cases where counsel was found ineffective for misinforming the client, *id.* at 1330-31, the district judge found that O'Donnell did not provide incorrect information about sentencing exposure.

While agreeing with the petitioner "that in advising a client whether to accept a plea offer, a criminal defense attorney should evaluate and consider that client's sentencing exposure under the Federal Sentencing Guidelines," and observing that "it would have been preferable if O'Donnell has discussed the Guidelines and Petitioner's possible sentencing exposure under those Guidelines with Petitioner when presenting the plea offer to him," the district judge opined that O'Donnell "merely accepted his client's rational decision to refuse a favorable plea offer." *Id.* 1334-35.

The district judge further reasoned that even if O'Donnell provided ineffective assistance, the petitioner was not entitled to relief because he failed to prove that he was prejudiced pursuant to *Strickland*. According to the district judge, the petitioner was required under *Strickland* to "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1335. The district judge did not address the different test for prejudice in the plea process announced in the post-*Strickland* decision of *Hill v. Lockhart*, *supra* (holding that a defendant need only show a reasonable probability that, but for counsel's failures, he would have changed his plea). (The difference in the two tests is deemed material in the Fourth and Sixth Circuits as explained in the Argument.) The district judge concluded that the petitioner's testimony that he would have accepted the plea offer was not credible because it was self-serving and not supported by any "objective evidence" because there was "little if any disparity between Petitioner's actual sentence and his sentencing exposure as he understood it at the time he rejected the misdemeanor plea offer." *Id.* at 1335-36.

D.

The district judge issued a certificate of appealability on the following issue: "whether trial counsel was ineffective for inadequately advising the petitioner regarding the terms of [the] plea agreement offered by the government prior to trial and the consequences of refusing the plea offer." (App. C).

E.

On appeal, the petitioner challenged the district judge's failure to apply the test for prejudice in the plea process announced by this Court in *Hill v. Lockhart*. The petitioner also challenged the district judge's conclusion that there was no "objective evidence" to support the petitioner's testimony that he would have accepted the plea offer had he been properly informed and advised by trial counsel. The petitioner cited numerous decisions from other circuits holding that objective evidence is supplied, and prejudice therefore established under *Hill v. Lockhart*, where there is a substantial disparity between the sentence under the plea offer and the

sentence ultimately imposed.

In its decision affirming the district judge's ruling (App. A), the Eleventh Circuit did not address the petitioner's claim that the district judge applied the wrong legal standards for determining prejudice in the plea process.

As for the petitioner's contention that the substantial disparity between the sentence he received and the plea offer sentence constituted objective evidence that corroborated his testimony that he would have accepted the plea offer had he received effective assistance of trial counsel, the Eleventh Circuit stated only the following: "Thus, notwithstanding the great disparity in the sentence exposure between the plea offer and going to trial, Goudie has failed to establish that he would have pleaded guilty but for counsel's errors." (App. A).